

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL W. CREED)	
Claimant)	
VS.)	
)	
U.S.D. 353)	Docket No. 1,053,541
Respondent)	
AND)	
)	
ACCIDENT FUND GENERAL INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the January 2, 2013, Post-Award Medical Order by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

APPEARANCES

David H. Farris, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant was entitled to post-award medical treatment and authorized Dr. George Fluter to provide treatment. The ALJ also found claimant's attorney was entitled to post-award attorney fees for 20.1 hours of work performed for the post-award proceedings at \$150 an hour.

The respondent requests review of the ALJ's authorization of Dr. Flutter to provide claimant with post-award medical treatment. Respondent argues that claimant is not entitled to post-award medical treatment as the need is due to claimant's underlying osteopenia, osteoporosis and advanced age, not his on-the-job injury. In the alternative, should the Board affirm the ALJ's Order, respondent argues it should be allowed to determine the physician that provides claimant with treatment.

Claimant argues that the Award should be affirmed. Claimant's counsel also requests payment of fees associated with this appeal.

FINDINGS OF FACT

Claimant sustained an L3 compression fracture to his back on May 29, 2010, while working for respondent. Claimant fell flat on his back after his feet went out from underneath him when he went to pick up a five gallon bucket of wax. Claimant was knocked unconscious for a short period. Claimant initially obtained medical treatment at the hospital in Wellington, Kansas. X-rays revealed multiple compression fractures from L2-5 with at least a 50 percent loss of height. He was transferred to Wesley Medical Center in Wichita. An MRI on June 4, 2010, revealed an acute compression fracture at L3. On July 7, 2010, claimant underwent a vertebroplasty at L3. Claimant reported temporary improvement in his symptoms

Claimant filed a workers compensation claim, which settled on August 24, 2011, on a running award, with the right to future medical treatment left open, and a lump sum payment of \$50,000. The medical opinions attached to the Worksheet For Settlements, indicated claimant was no longer able to perform work in the open labor market. During the settlement hearing claimant was asked if he understood his rights may include a finding that he was permanently and totally disabled (PTD), which claimant acknowledged. However, the payout for PTD, based upon claimant's average weekly wage, would extend for approximately 22 years. At the time of the settlement hearing, claimant was 80 years old.

Less than two months later, in October, 2011, claimant was advised that respondent was no longer authorizing ongoing medical treatment. Claimant filed a K-WC E-4 Application for Post-Award Medical with the Division on November 18, 2011.

Claimant retired from his employment on May 29, 2010, the day he was injured. Since then claimant has been unemployed and has spent most of his time laying in bed on his back.

At his attorney's request, claimant met with board certified physical medicine and rehabilitation specialist George Flutter, M.D., for an examination on February 28, 2011. Dr. Flutter noted claimant worked for respondent as a custodian for 20 years. The history of injury was consistent with claimant's testimony. Claimant reported low back pain and

numbness in his legs, feet and fingers. Claimant's pain was a 10 on a scale of 0 to 10, with standing, bending, and twisting aggravating his symptoms. Claimant described the pain as constant.

Dr. Fluter examined claimant and opined that he was status post work-related injury on or about May 29, 2010, with an acute L3 compression fracture; was status post L3 vertebroplasty and had persistent back pain. An MRI from June 4, 2010, indicated the vertebral body height at L3 had been decreased by approximately 50 percent, with the compression fracture read as acute. Dr. Fluter opined there is a causal/contributory relationship between claimant's condition and the reported injury on or about May 29, 2010, and its sequelae.

Dr. Fluter went on to recommend the following restrictions: no lifting, carrying, pushing or pulling more than 20 pounds occasionally, 10 pounds frequently; limit bending, stooping and twisting to an occasional basis; limit squatting, kneeling, crawling, and climbing to an occasional basis.

Dr. Fluter recommended the following: treatment using medication to modulate pain symptoms; the use of adjuvant medications should be considered; a lumbar epidural steroid injection under fluoroscopic guidance directed at L3 on an empiric basis; intermittent use of a soft abdominal/lumbar brace, and continued use of straight cane.

At claimant's attorney's request, Dr. Fluter examined claimant again on April 4, 2012. Claimant continued to complain of low back pain and had started to experience pain in his left thigh. Claimant reported that sometimes his left leg doesn't want to hold him up, and he reported that coughing, sneezing and Valsalva maneuvers increased his back and leg pain. Sitting, standing, walking, bending, twisting and exercise also increased the pain, which was eased when the activities ceased. Claimant also reported numbness in his legs, feet and hands.

Dr. Fluter examined claimant and again opined he was status post work-related injury on or about May 29, 2010; had an acute L3 compression fracture; was status post L3 vertebroplasty; had persistent back pain; and had left lower extremity pain. He felt there is a causal/contributory relationship between claimant's current condition and the reported injury on or about May 29, 2010 and its sequelae. He reported that he was unable to determine if there was any progression in claimant's condition because no additional imaging studies had been done.

Dr. Fluter recommended another x-ray and MRI of the lumbar spine. He indicated that if the L3 vertebra was involved, it would be more likely than not that claimant's condition would be related to the May 29, 2010, injury. If the L3 vertebra is not involved, the current condition would be related to the natural aging process. He agreed with Dr. Fevurly that claimant should not take non-steroid anti-inflammatory agents and corticosteroids due to adverse effects. He felt claimant would benefit from using a soft

lumbar support and opined that in the event there is additional compression of the L3 vertebra or additional compression of other vertebrae then vertebroplasty may be an option.

On July 27, 2012, Dr. Fluter reviewed claimant's x-rays and a recent February 8, 2012, MRI. He read the MRI to display a 75 percent loss of vertebral body height at L3. Dr. Fluter determined it is more likely than not that the L3 vertebra is the primary pain generator and claimant's current symptoms and need for medical treatment are related to claimant's injury on May 29, 2010.

At respondent's request, claimant met with board certified internal medicine specialist Chris Fevurly, M.D., for an examination on April 8, 2011. Dr. Fevurly noted claimant has had back pain for at least 8 to 9 years and has undergone treatment with a chiropractor several times for adjustments. This record indicates claimant last received chiropractic treatment in September 2009. Dr. Fevurly noted that when claimant reported his back pain to his primary care physician's nurse practitioner after the accident, he reported that the pain was different in nature and severity from his prior back pain.

Claimant presented to Dr. Fevurly with back pain and an inability to walk or drive for long distances. Claimant used a cane to keep him stable, and had developed bladder outlet obstruction from his bladder to his prostate, post surgery, three days before this examination. In Dr. Fevurly's opinion, this was unrelated to his back injury.

Dr. Fevurly examined claimant and opined claimant's work accident resulted in an acute compression of the L3 vertebral body; treatment with vertebroplasty resulting in mild improvement of low back pain; 75 percent loss of body height post vertebroplasty, and a loss of 1-2 inches of height in the previous two years.

He noted preexisting factors of multiple old compression fractures at L2 through L5, and found it was likely that claimant had a previous compression at L3 with worsening as a result of the May 29, 2010, event; chronic loss of vertebral height (L2 through L5) based on June 4, 2010, MRI; osteopenia, cause undetermined and a history of low back pain according to claimant's primary care physician.

Dr. Fevurly opined that the May 29, 2010, work event produced further compression of a preexisting compression deformity of L3, consistent with further acute fracture and resulting in further loss of L3 vertebral height. He indicated there was evidence of preexisting osteopenia, which he felt contributed to the preexisting development of multilevel vertebral body compression deformities from L2 to L5. He did not know the cause of the osteopenia, but determined it was not caused by claimant's work duties.

Dr. Fevurly noted that claimant has been at maximum medical improvement since December 5, 2010, and had a 20 percent whole person impairment, with 5 percent accounting for preexisting conditions, leaving claimant with a 15 percent whole person

impairment. He felt that claimant is not longer able to work in any fashion due to the severe nature of his osteopenia, multiple compression deformities and ongoing low back pain accompanied by his multiple other medical conditions.

Dr. Fevurly again examined claimant on February 17, 2012. Dr. Fevurly was asked to meet with claimant to determine the need for and causal relationship of any further medical care to claimant's current low back pain. He was asked to determine whether claimant's current pain is related to the May 29, 2010, event or to claimant's natural aging process.

Dr. Fevurly examined claimant and found claimant's condition to be similar to that in April 2011. Claimant had tenderness throughout his low back and diminished range of motion in the low back. He determined that the work injury on May 29, 2010, resulted in further compression of L3 with loss of height of 75 percent, based upon the prior MRI on August 18, 2010, and that claimant has preexisting osteopenia with multiple old compression deformation of L2 through L5. Dr. Fevurly noted that claimant had preexisting chronic low back pain for eight years or so prior to the work event on May 29, 2010, and that this chronic low back pain was likely associated with the preexisting vertebral compression deformities. Claimant also has had type II diabetes with associated peripheral neuropathy in the lower extremities for the past five or six years.

Dr. Fevurly had no change in his opinion regarding causation, maximum medical improvement, reasonableness of care, and permanent impairment from the original IME. He opined that claimant's current need for treatment is due to the slow progression of his other vertebral bodies collapsing, stating:

A. . . . He still has low back pain. It is reasonable to believe that it is primarily related to further compression that's occurring in the vertebral bodies that are already compressed from underlying osteoporosis. So the answer would be I think that it's more likely to be related to these other vertebral bodies that were not compressed at the time of the fall on May 29, 2010.¹

. . .

Q. You would agree that the accident this gentleman sustained permanently aggravated and accelerated his underlying back pain?

A. Yes. Actually, I will say that it clearly caused an acute compression of L3. And by definition, I think it aggravated it and injured it to the point where it had a significant impairment, . . .²

¹ Fevurly Depo. at 30.

² *Id.* at 32-33.

Dr. Fevurly also testified:

A. Well, I mean, I believe that he has more severe back pain. The question, and I've already addressed this, is why does he have more severe back pain, and it would be my opinion that it's more likely that it's because of further compression in those osteoporotic vertebral bodies that exist at L2, L4 and L5. And I will admit that he has this problem at L3, but with the concrete in there, I don't believe it's likely that he's compressing that further, if you understand.³

Dr. Fevurly acknowledged that he had not seen the actual MRI films, only the reports. It appeared, at his deposition, that he had not been provided the films or the report from the most recent February 8, 2012, MRI, until the time of the deposition. He didn't recommend claimant have any more epidural injections as they could cause his osteoporosis to get worse and probably not alleviate or reduce claimant's back pain. He considered tramadol and neurontin as possible options to treat claimant's pain.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

K.S.A. 2009 Supp. 44-510k states:

(a) At any time after the entry of an award for compensation, the employee, may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments

³ *Id.* at 34.

⁴ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

Claimant requests post-award medical treatment for the injury suffered on May 29, 2010, to his low back. Dr. Flutter determined that claimant's current need for medical treatment is related to that work injury. Dr. Fevurly, on the other hand, testified that the need for treatment stems from claimant's other degenerative conditions at several other levels of his lumbar spine. The ALJ found Dr. Flutter's opinion the most persuasive. The Board agrees.

Dr. Flutter had the opportunity to assess all three MRI reports and the actual MRI CD from June 4, 2010 and October 18, 2010. Dr. Fevurly had the MRI reports from the earlier tests, but not the actual CD. Additionally, it appears that Dr. Fevurly was not provided the most recent MRI report until the time of his deposition. Dr. Flutter found claimant's injury from May 29, 2010, caused a 50 percent compression at L3, with a 75 percent compression diagnosed at the time of the final MRI. The compressions at the other levels of claimant's lumbar spine had remained the same, pursuant to his review of the three MRI's. The available evidence supports the finding by the ALJ that claimant's current need for medical treatment stems from the accident on May 29, 2010. The Post-Award Medical Order of January 2, 2013, is affirmed.

Respondent argues it has a statutory right to direct the medical care and treatment of an injured employee. However, the Board is troubled by respondent's settlement of this matter, leaving ongoing medical care open, on August 24, 2011, followed almost immediately with an October 2011 denial of future medical treatment.

The ALJ awarded claimant's attorney post-award attorney fees. Respondent's Application For Appeal does not challenge this order. Claimant requests additional attorney fees stemming from respondent's appeal of this matter to the Board.

The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits⁶ and authorizes an award of attorney fees in connection with that request.⁷

K.S.A. 2000 Furse 44-536(g) states:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

The Board is limited under K.S.A. 2009 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

K.S.A. 2009 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.⁸

The Board does not take original jurisdiction of attorney fee disputes. It is limited to reviewing those determinations of an ALJ. Claimant is directed to present this question to the ALJ for the initial determination as to what, if any, additional attorney fees he may be entitled.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied his burden of proving the current need for additional medical treatment stems from the work-related accident on May 29, 2010.

⁶ K.S.A. 2009 Supp. 44-510k(a).

⁷ K.S.A. 2009 Supp. 44-510k(c) and K.S.A. 2000 Furse 44-536(g).

⁸ K.S.A. 2009 Supp. 44-555c(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Order of Administrative Law Judge Nelsonna Potts Barnes dated January 2, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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